

August 6, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT YANKEE,)	Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

NRC STAFF ANSWER TO NEC MOTION
TO FILE SUPPLEMENTAL AUTHORITY

INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), the NRC Staff (“Staff”) herein answers “New England Coalition, Inc.’s (NEC) Motion to File Supplemental Authority In Support of NEC Opposition to NRC Staff Motion to Strike NEC Response to NEC Staff’s Summary Disposition Answer” (“Motion”). For the reasons set forth below, the Staff opposes NEC’s motion because NEC “supplemental authority” is taken out of context, has no precedential effect, and does not support NEC’s position.

DISCUSSION

On May 18, 2007, without first seeking permission from the Board, NEC filed a response to the Staff’s answer to Entergy’s April 19, 2007 motion for summary disposition. See New England Coalition, Inc.’s (NEC) Response to NRC Staff’s Answer in Support of Entergy’s Motion for Summary Disposition of New England Coalition Contention 3 (Steam Dryer) (“NEC Response”). On May 29, 2007, the Staff filed a motion to strike NEC’s answer. See NRC Staff Motion to Strike NEC Response to NRC Staff’s Summary Disposition Answer (“Motion to Strike”). On June 8, NEC filed “New England Coalition, Inc.’s (NEC) Opposition to Staff Motion to Strike NEC Response to NRC Staff’s Summary Disposition Answer” (“NEC Opposition”). On

July 25, 2007, NEC filed the instant motion to add authority in support of its opposition to the Staff's motion to strike.¹

In the instant motion NEC requests that the Board consider the discussion in a *selected* portion of footnote 14 on pages 15-16 of Memorandum and Order (Denying AmerGen's Motion to Summary Disposition) (June 19, 2007) (unpublished) as supplemental authority supporting its opposition to the Staff's motion to strike. NEC omitted a critical detail that in footnote 14, the Board expressly stated that it did not need to rule on whether replies to answers to motions for summary disposition are authorized in Subpart L proceedings. Moreover, the Board noted that the Staff's argument that 10 C.F.R. § 2.1205 does not authorize replies has merit. Thus, footnote 14 as a whole does not support NEC's opposition to the Staff's motion to strike.

Footnote 14 has no precedential effect either in this proceeding or in the *Oyster Creek* proceeding. Since the Oyster Creek Board did not resolve the issue it has no precedential effect in that proceeding. In this proceeding it has no precedential effect because licensing board decisions are only precedential in the proceeding in which they are issued. See *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), CLI-95-2, 41 NRC 179, 189-90 (1995). See also *Baltimore Gas & Elec.* (Calvert Cliffs Nuclear Power Plant Units 1 & 2), CLI-98-25, 48 NRC 325, 343 n.3 (“[U]nreviewed Board rulings do not constitute binding precedent or binding law at this agency.”). Therefore, footnote 14 is not authoritative.

The Staff moved to strike NEC's Response not only because it is not authorized by § 2.1205(c) and NEC did not obtain leave from the Board to file a response, but because NEC did not confine its response to new facts or arguments in the Staff's Answer. In large part, NEC's Response made arguments addressing facts presented by Entergy in its motion for

¹ NEC's motion is not timely. Pursuant to 10 C.F.R. § 2.323(a), motions must be made no more than 10 days after the occurrence or circumstance giving rise to the motion. NEC's "Supplement Authority" is dated June 19, 2007 and was available through the NRC's Agencywide Documents Access and Management System (ADAMS) by June 22, 2007.

summary disposition. See Motion to Strike at 2 and n.1. Even in Subpart G proceedings, parties are only allowed to respond to new facts and arguments presented in support of a motion for summary disposition. See 10 C.F.R. 2.710(a). Thus, NEC's Response was not authorized under either § 2.1205(c) or § 2.710(a). Neither section entitles NEC to a second opportunity to respond to a motion for summary disposition.

CONCLUSION

For the reasons discussed above, the Staff opposes NEC's Motion.

Respectfully submitted,

/RA/

Lloyd B. Subin
Counsel for NRC Staff

/RA/

Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of August, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR VERMONT YANKEE,) Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)
OPERATIONS, INC.) ASLBP No. 06-849-03-LR
)
(Vermont Yankee Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO NEC MOTION TO FILE SUPPLEMENTAL AUTHORITY" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 6th day of August, 2007.

Alex S. Karlin, Chair
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Thomas S. Elleman*
Administrative Judge
Atomic Safety and Licensing Board
5207 Creedmoor Road, #101
Raleigh, NC 27612
E-mail: elleman@eos.ncsu.edu

Sarah Hofmann, Esq.*
Director of Public Advocacy
Department of Public Service
112 State Street - Drawer 20
Montpelier, VT 05620-2601
E-mail: sarah.hofmann.state.vt.us

Richard E. Wardwell
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rew@nrc.gov

Ronald A. Shems, Esq*
Karen Tyler, Esq.
Shems Dunkiel Kassel & Saunders, PLLC
91 College Street
Burlington, VT 05401
E-mail: rshems@sdkslaw.com
Ktyler@sdkslaw.com

Office of Commission Appellate
Adjudication
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAmal@nrc.gov

Marcia Carpentier, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mxc7@nrc.gov

Peter C.L. Roth, Esq.*
Environmental Protection Bureau
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301
E-mail: peter.roth@doj.nh.gov

Anthony Z. Roisman, Esq.*
National Legal Scholars Law Firm
84 East Thetford Rd.
Lyme, NH 03768
E-mail: aroisman@nationallegalscholars.com

David R. Lewis, Esq.*
Matias F. Travieso-Diaz
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128
E-mail: david.lewis@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.co

/RA/

Mary C. Baty
Counsel for the NRC Staff